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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RODNEY HERNANDEZ, Defendant and Appellant.	H033152 (Santa Clara County Super. Ct. No. CC769784)

I. STATEMENT OF THE CASE

A jury convicted defendant Rodney Hernandez of two counts of rape by force or fear, sexual penetration by force or violence, and dissuading or attempting to dissuade a witness by force or the threat of force. Defendant also admitted that he had previously suffered six serious felony convictions, including some for sexual offenses, and served two prison terms. (Pen. Code, §§ 261, subd. (a)(2), 289, subd. (a)(1), 136.1, subd. (c)(1), 667, subds. (b)-(i), 1170.12, 667, subd. (a), 667.5, subds. (a) & (b), 667.61, subds. (a) & (d).) The court sentenced defendant to an indeterminate term of 175 years to life plus a determinate term of 42 years as follows: concurrent terms of 75-year to life for the rapes; an identical consecutive term for forcible penetration; a 25-year term for dissuading a witness; and a total of 42 years for the prior conviction and prior prison term enhancements.

On appeal from the judgment, defendant contends that the court committed reversible error in admitting evidence of his prior sexual offenses, his three-strike status, the victim's mother's understanding of why defendant had previously been in prison, his parole condition that he not live with minors, and his girlfriend's understanding of why he had been in prison. Defendant also contends that his sentence violates the constitutional proscriptions against cruel and/or unusual punishment.

We find no merit to these contentions and affirm the judgment.

II. THE EVIDENCE

The Present Offense

A., the victim, was born in 1988. She had known defendant all her life because he had been married to her aunt, and A. continued to regard defendant as her uncle. When she was a young girl, she visited him in prison. A.'s mother had always thought that he was there for statutory rape involving consensual sex with a minor.

On Saturday night, May 26, 2007, defendant invited several people over to the mobile home of his girlfriend, Patricia, where he also lived, to watch a pay-per-view boxing match and drink beer and shots of tequila. The guests included A.; A.'s mother, Robin; and Robin's fiancé, Sheldon.

Around 10:00 p.m., A.'s car, which she had parked in a no parking zone, was about to be towed, and defendant and a friend went outside. Defendant aggressively approached the tow-truck driver, but his friend restrained him, and the driver left without towing the car.

Around midnight, the guests departed but A. decided to stay because she wanted defendant's advice about her recent break with her boyfriend. Robin took A.'s car keys before leaving because A. had been drinking. When they were alone, A. and defendant then talked and had a couple of tequila shots.

At some point, defendant started asking sexually provocative questions concerning whether A. could handle casual sex and oral copulation with him. A. got scared. Then suddenly, defendant grabbed A. by her shorts. When she pushed him away, he said she could not handle it. She agreed and told him to consider what he was doing. However, he grabbed her again, pushed her to the floor, and got on top of her. She screamed and resisted, but he took a jar and threatened to hit her with it if she continued. He then undid his pants, penetrated her, and fondled her breasts. She succeeded in pushing him off, but he got back on top of her and penetrated her again. During this time, she cried and asked him why he was doing this to his niece. Defendant put his hand over her mouth and told her to be quiet or else she would turn up "missing," and he would tell people that she had left the party with her ex-boyfriend. He explained that if she reported him, he would go to jail for a long time because it would be his "third strike . . . ."

Ultimately, defendant got off A. He ordered her to disrobe and told her to go take a shower. He said that he had not ejaculated but wanted her to wash herself anyway. She asked what she would have to do to be able to leave, and he said she had to convince people that she had consented to have sex. A. was afraid defendant would kill her, cried, and vomited. While she was in the shower, defendant digitally penetrated her and then said she had a "grade A bomb pussy." At one point defendant spoke to someone on the phone about getting there quickly. He then told A. that she had to convince that person that they had been drinking together, she had made advances to him, and they had had consensual sex. Defendant made her repeat the story several times until he was satisfied.

Patricia arrived and found A. crying in the shower. A. told her she had drunk too much and wanted to go home. Patricia asked if anything had happened, but A. said no, and everything was fine. Patricia asked if defendant had had sex with her. A. admitted they had but, afraid of what defendant might do, denied that he had forced her to have sex. Patricia gave A. some clothes and took her to a bedroom, but A. could not sleep.

She sent text messages to her ex-boyfriend and Sheldon, asking them to come get her as soon as possible.

Sheldon arrived around 7:00 a.m. the next morning. He saw that A. was scared and upset and asked if defendant had touched her, but she said no. They left. When A. finally got to her own car, she cried hysterically and drove to her ex-boyfriend's house and told him what had really happened. He told her to call the police. A. then went home and told her mother, who called the police.

When she spoke to the police, A. did not appear intoxicated or hung over, but she was still upset and crying. She said that she had had one beer and three or four shots of tequila the night before. She also said that defendant had penetrated her twice. Later, at the hospital, she was examined by a sexual assault response team (SART) nurse, Laura Tracy. A. was quiet and fearful. She said defendant had penetrated her twice even though she fought back. Tracy saw no signs of genital injury but testified that that was typical in most cases. However, she said that A.'s general body aches and pains were consistent with her description of being assaulted and struggling against defendant.

Later that day police arrested defendant. He hit his head when they ordered him to the ground. An examination later revealed A.'s DNA in defendant's genital area. In addition to the abrasion on his head, defendant had multiple recent scratch-like injuries on his neck, palm, shoulder, and bicep. He said that he might have sustained some minor injuries during an encounter with a tow truck driver.

At trial, Rape Crisis Center Counseling Coordinator Jenny Adler testified as an expert on rape trauma syndrome. The syndrome describes the stages of response to a sexual assault. The initial crisis impact stage may not take hold immediately for hours or days following an assault and can include flashbacks, nightmares, anxiety attacks, depression, and self-harming behavior. At this time, victims sometimes are unable to identify or say they have been assaulted. The following shock stage can last and delay

reporting. In the reorganization stage, the victim tries to make sense of what happened and can experience mood swings. The final resolution stage is characterized by a level of healing.

Victims variously react to assaults by fighting, running, or freezing. Freezing is most common, especially when the perpetrator makes threats and is a family member or a known and trusted person, which increases the victim's shock and disorientation and makes submission more likely. In that case, victims often try to negotiate their way out of the situation and are less likely to report the perpetrator because of mixed emotions and worry about the ramifications reporting might have on the family. It is also common for victims to suffer pain, nausea, and vomiting solely from the stress of the event.

Prior Unlawful Sexual Acts

Connie, who went to high school with defendant, testified that in 1986, when she was 19, defendant came to a party at her and her boyfriend's home and ended up staying overnight. The next morning, after her boyfriend had left, Connie asked defendant if he was ready to leave. Defendant told her to disrobe. She thought he was joking, but he became serious, repeated his demand, and then started tearing off her clothes and threatening to rape and kill her. She resisted him, but he put his arm around her neck, choking her, and pulled her upstairs toward her bedroom. Fortunately, she was able to slam him against a door, and they both fell to the ground. Defendant then let go and started to cry. He said he was not going to hurt her and asked why she distrusted him.

Connie feared that defendant would harm her and did not immediately report the incident. However, later, when defendant was being prosecuted for raping her friend Elizabeth, she reported the assault, and defendant was convicted of it.

Elizabeth and defendant also were in high school together and dated for awhile. She testified that in August 1987, defendant came over to her apartment because he was upset. They talked in the backyard for awhile, and at one point he said he had to use the

bathroom and asked her if she would hold his penis. When she refused, he tried to carry her inside with him. However, she pulled away, and defendant went in by himself. When he came back out, she was not afraid, and they continued their conversation at a nearby creek. There, however, defendant grabbed her by the throat, pushed her back, and pulled up her blouse and bra. She told him to stop, but he told her he had military training and could instantly kill her. He put bricks and stones near her head and threatened to smash her face. He then removed their pants, raped, and orally copulated her. Later, he forced her to orally copulate him. At one point, she was able to push him away, and they both tumbled down an embankment, but he dragged her back up. A neighbor came outside, and defendant covered her mouth and threatened to kill her if she yelled. He also raped her again. Thereafter, she was able to return to her apartment by offering to get him something to drink. Once inside, she called a friend, who later called the police. Defendant was arrested, confessed, and pleaded guilty to the offenses against Elizabeth.

In July 1987, before he assaulted Elizabeth, defendant assaulted Michelle and Monica. He admitted to police that he used a razor blade to accost two young women. He forced them to disrobe and get on the ground and then ordered one to orally copulate the other. He said he had wanted to punish them. He was later convicted of sexual assaults.

The Defense

Defendant's girlfriend, Patricia, testified that she had known him for 20 years and had dated him before and after he was sent to prison for assault with intent to commit rape and forced oral copulation. After his arrest in this case, she visited him 58 times. She said that around 2:00 a.m., on the night of the party, she spoke to A. on the phone. A. slurred her words and sounded drunk and happy. When she got home later that morning, A. was naked on the floor of the shower and smelled of alcohol. There was

vomit on the bathroom floor. When she asked A. if anything had happened, A. said she had drunk too much and wanted to sleep. Patricia asked if A. had had sex, but A. insisted that nothing had happened. Later that morning, Sheldon came and picked A. up.

Patricia admitted that for two months, her two teenage children did not live with her while defendant was there. She denied that the reason was that defendant was not allowed to be around children, and she denied telling police that that was the reason. However, she was impeached with her tape recorded statement to the police that defendant's probation condition did not allow him to be around minors.

At trial, Patricia also admitted that she had cleaned up empty bottles when she got home after defendant's party, but she denied telling police that she had not cleaned up. Again, however, she was impeached with her tape recorded statement, saying she had not cleaned up.

III. ADMISSION OF EVIDENCE[1]

Defendant contends that the court erred in admitting evidence of his prior sexual offenses, his status as a third-striker, Robin's and Patricia's understanding of the reason he had been in prison, and his parole restrictions on living with minors.

Prior Sexual Misconduct

Defendant claims the court erred in admitting the evidence of his prior sexual offenses against Connie, Elizabeth, Monica, and Michelle to prove a propensity toward such conduct. He first argues that its admission violated his constitutional rights to due process and a fair trial. He further argues that the court abused its discretion in finding the evidence more probative than prejudicial under section 352.

Defendant correctly acknowledges that his claim of constitutional error is foreclosed by *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*), in which the California Supreme Court held that the admission of propensity evidence under section 1108 does

[1] In this section, all unspecified statutory references are to the Evidence Code

not violate a defendant's right to due process and a fair trial. (*Id.* at p. 911; see *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; e.g., *People v. Terry* (2005) 127 Cal.App.4th 750, 777 [constitutional challenge to § 1108 foreclosed].) Defendant says he is asserting this claim only to preserve the issue for federal review. Thus we need not discuss it further.

Turning to defendant's second claim of error, we note that section 1108 allows the admission of evidence of an uncharged "sexual offense" to prove a propensity toward such misconduct only if the evidence passes muster under section 352.[2] (*People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1013.)

Section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." In this context, prejudicial means " 'evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues.' " (*People v. Bolin* (1998) 18 Cal.4th 297, 320; see also *People v. Harris* (1998) 60 Cal.App.4th 727, 737 (*Harris*).) " 'In applying section 352, "prejudicial" is not synonymous with "damaging." ' [Citation.]" (*People v. Karis* (1988) 46 Cal.3d 612, 638.) "Painting a person faithfully is not, of itself, unfair." (*Harris, supra,* 60 Cal.App.4th at p. 737.)

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[2] Section 1108, subdivision (a) provides, "(a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

Defendant's prior convictions for rape, assault with intent to commit forcible oral copulation, oral copulation by force, and assault with intent to commit rape each constitute a "sexual offense" within the meaning of section 1108. (§ 1108, subds. (d)(1)(A) & (B); Pen. Code, §§ 261, subd. (a)(2), 220, and 288a, subd. (c).)

In determining whether to admit uncharged sexual offenses under section 352, the trial court must consider in the "nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense. [Citations.]" (*Falsetta, supra,* 21 Cal.4th at p. 917; *People v. Wesson* (2006) 138 Cal.App.4th 959, 969.)

On appeal, we review a ruling under sections 1108 and 352 for abuse of discretion and will not disturb it "except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10; *People v. Cudjo* (1993) 6 Cal.4th 585, 609; *People v. Branch* (2001) 91 Cal.App.4th 274, 280-281; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1315; *People v. Wesson, supra,* 138 Cal.App.4th at p. 969.)

Initially, we observe that this case is the type envisioned by the Legislature when it enacted section 1108. As the court explained in *People v. Fitch* (1997) 55 Cal.App.4th 172, "The Legislature determined that the nature of sex offenses, both their seriousness and their secretive commission which results in trials that are primarily credibility contests, justified the admission of relevant evidence of a defendant's commission of other sex offenses." (*Id*. at p. 184.) Here, A. accused defendant of raping her, there were no witnesses, and defendant denied the charge, arguing instead that he and A. had consensual sex. Under the circumstances, the jury was entitled to consider evidence that defendant raped and sexually assaulted other women in determining A.'s credibility and whether defendant was disposed toward sexual misconduct with young women.

With this in mind, we focus on whether the trial court reasonably concluded that the probative value of the evidence outweighed the possibility that its admission would necessitate undue consumption of time, confuse or mislead the jury, or uniquely evoke an emotional bias against defendant as a person. (*People v. Bolin, supra,* 18 Cal.4th 297, 320.)

First, the trial court reasonably could find that defendant's prior offenses were highly probative of a propensity to commit sexual misconduct and that the similarities among the prior and current offenses rendered such a propensity relevant in determining whether defendant's sexual encounter with A. was consensual. All of defendant's victims were young women around the same age. Defendant committed all of the offenses when he was alone with his victims, and there were no witnesses. Defendant previously knew Connie, Elizabeth, and A., they trusted him, and he was able to take advantage of their trust. He covered Elizabeth's and A.'s mouths to keep them quiet. The assaults against A., Elizabeth, Michelle, and Monica involved the use of an object or weapon to threaten injury. And all of the incidents involved assaults, rape, the threat of rape, or oral copulation.

Defendant argues that the incidents were too different to have much probative value. He notes that unlike A., Monica and Michelle were total strangers, and he forced them to perform an act on each other. He notes that he dated Elizabeth but not A. He notes that unlike the current offense, none of the prior offenses involved the use of alcohol. And last, he notes that he confessed to the prior offenses but not to assaulting A.

Although the assaults on Monica and Michelle were somewhat different from defendant's other misconduct, the trial court reasonably could find that the differences did not outweigh the similarities or undermine their relevance and probative value. Moreover, compared with the similarities among the incidents most of the differences that defendant notes are relatively insignificant. For example, that defendant dated

Elizabeth is a trivial distinction in light of the fact that defendant knew A., Connie, and Elizabeth, and was able to be alone with them because they trusted him. That defendant did not confess to the instant offense does not undermine the probative value of the prior offenses because this time defendant had a strong reason not to confess: his prior convictions rendered him subject to a long prison term as a recidivist offender. Similarly, that the prior offenses did not appear to involve the use of alcohol does not diminish their probative value. Simply put, if one commits sexual assaults when sober, it is certainly not less likely he might do so when his inhibitions are relaxed under the influence of alcohol.

Defendant notes that the prior offenses occurred over 20 years before the instant offense. He argues that the likelihood that memories faded and evidence vanished over time made it more difficult for him to defend against the prior offenses. He also argues that he "was a significantly different person [than] when he was a mature adult in his late 30s."

Because there were no bystander eyewitnesses to the prior offenses, the only defense was that the victims were lying and the assaults did not take place or the encounters were consensual. However, any such defense was foreclosed by defendant's confessions and convictions. Consequently, there was really nothing for him to defend against in the current trial.

Next, the remoteness of the prior offenses does not automatically or necessarily rob them of probative value. (*People v. Soto* (1998) 64 Cal.App.4th 966, 991.) There was little or no evidence that defendant had undergone some dramatic change during the intervening years after his release from prison or that he was a different person after his release from prison. Accordingly, the trial court reasonably could conclude that the age of the prior offenses did not militate against their admission. (E.g., *People v. Ewoldt* (1994) 7 Cal.4th 380 [12-year-old act properly admitted]; *People v. Wesson, supra,*

138 Cal.App.4th 959 [14-year-old act properly admitted]; *People v. Branch, supra,* 91 Cal.App.4th 274 [same re 30-year-old conduct]; *People v. Waple,*(2000) 79 Cal.App.4th 1389 [conduct between 15 and 22 years old]; *People v. Soto, supra,* 64 Cal.App.4th 966 [22- and 30-year-old conduct].)

Defendant argues that the evidence necessitated undue consumption of time, in that it involved three witnesses, required 37 pages of trial transcript and lengthy instructions and admonitions, and took up a considerable amount of closing arguments.

The record does not establish that when the court ruled, it was clear that the admission of the evidence would involve a mini trial or consume an undue amount of time. In actuality, it took less than an hour to introduce the relevant testimony. Moreover, defendant provides no authority suggesting that the length of time it might take to give standard instructions and admonitions on the proper use of evidence admitted for a limited purpose or the amount of time that counsel might devote to the evidence during final arguments is relevant in determining whether the evidence was admissible. We doubt that either is relevant. In any event, the record does not show that either the instruction and admonitions or counsels' arguments consumed much time or had any tendency to confuse the jurors. On the contrary, insofar as closing arguments correctly emphasized the court's instructions concerning the proper use of the evidence, they helped prevent any potential prejudice.

Defendant argues that the evidence was highly inflammatory in that it had the "effect" of painting him as an "uncontrollable sexual predator," "willing to employ violence and threats against his victims . . . ." However, the Attorney General argues, and we agree, that such a portrayal is simply another way of saying that the evidence was highly probative of a propensity to commit violent sexual assaults. As noted the evidence was admissible for that purpose. Thus, even if jurors viewed defendant as a sexual

predator, that characterization was reasonable and does not constitute the sort of prejudice envisioned by section 352.

Moreover, the trial court reasonably could have found that the circumstances of defendant's prior offenses were not more inflammatory than those surrounding the charged offense such that they might evoke a particularly prejudicial emotional bias against defendant as an individual. On the contrary, a reasonable juror could consider the instant charges more inflammatory, in that defendant supplied alcohol to his underage ex-niece, exploited her interest in seeking his advice about her recent breakup, and painfully breached her trust by physically attacking her, raping and digitally penetrating her, and threatening to kill her.

We also note that the jury learned that defendant had been punished for his past offenses. Thus it was not likely to lose sight of the issues in this case and convict defendant to prevent him from escaping punishment for his prior misconduct.

Finally, the court reasonably could have concluded that any potential inflammatory prejudice from the evidence would be ameliorated by the standard instruction that informed jurors that the prosecution had the burden to prove defendant's guilt of the charged offenses beyond a reasonable doubt; they could, but were not required to, find that defendant was disposed to commit sexual offenses; and, insofar as the prior offenses showed a propensity, that was only one factor to consider in determining defendant's guilt, and the prior offenses were not enough by themselves to find him guilty. (See CALCRIM No. 1191.)

In sum, the record does not establish as a matter of law that defendant's prior offenses were potentially more prejudicial than probative or that the trial court abused its discretion under section 352.

People v. Harris, supra, 60 Cal.App.4th 727, on which defendant relies, does not convince us otherwise. There, the prior offense involved a gruesome, bloody attack on

and genital mutilation of a female tenant in an apartment complex managed by the defendant. However, he was convicted only of burglary. At the trial on new charges, the jury was presented with an incomplete and distorted description of the prior incident, which had occurred 23 years before. Moreover new the charged offenses were far less shocking and brutal and involved totally dissimilar conduct—the defendant licked and fondled a woman and a former consensual sexual partner. (*Id.* at p. 733-735.) On appeal, the court found that the remoteness of the incident and its great and obvious dissimilarity to the charged offenses gave it little, if any, probative value. Furthermore, the prior incident was vastly more inflammatory than the charged offenses, and there was a possibility of confusion since the jury may have speculated about why in the prior case the defendant suffered only a burglary conviction. As a result, the jury might have wanted to punish him for the horrible assault by convicting him of the charged offenses. Under the circumstances, the reviewing court held that the trial court had abused its discretion in finding that the evidence was more probative than prejudicial. (*Id*. at pp. 739-740.)

The numerous material factual differences between *Harris* and this case render it inapposite.

Three-Strike Status

Defendant contends that the trial court erred in overruling his objection to evidence of defendant's statement to A. that if she reported the assault he would face a long sentence because it would be his "third strike . . . ." He claims the evidence was irrelevant and prejudicial because "a 'third striker' is perceived by the general public as the 'worst of the worst': a serial violent or serious criminal who has failed to learn his lesson from past encounters with the criminal justice system."[3]

[3] The Attorney General argues that in failing to specify the grounds for his objection to the evidence, defendant forfeited his claim on appeal. We find no forfeiture.

The trial court found the evidence to be relevant and more probative than prejudicial. We agree.

The court reasonably could have found the evidence showed that defendant had a strong motive to threaten A. and dissuade her from reporting his offenses a witness. Moreover, because the statement strengthened his threat to make her turn up "missing," the evidence supported A.'s testimony that she was afraid and helped explained why she initially denied to Patricia that anything had happened. Moreover, that defendant uttered the statement had some tendency to rebut his defense of consent, in that defendant would not have had to threaten A. and explain that he faced a long sentence if she had consented to have sex with him in the first place. The evidence would also rebut any suggestion that defendant mistakenly thought A. had initiated the encounter and consented to have sex.

Furthermore, the trial court reasonably could have found that any potential prejudice would be de minimus because the jury was going to learn about defendant's other sexual offenses, there was no formal testimony establishing that defendant was, in fact, a three-striker, and the court intended to admonish the jury that it could consider the evidence only insofar as it revealed A.'s and defendant states of mind at the time and for no other purpose.[4]

Although defense counsel did not specify the grounds, the trial court's ruling reflects its understanding that the grounds were relevance and prejudice.

[4] The court instructed the jury that "the testimony you heard concerning the defendant's statements to [A.] involving his criminal history or [A.'s] belief about his history as a three-striker is offered only for a limited purpose. [¶] It's not offered for the truth of whether or not he is a three-striker, but it's offered only to show that [A.'s] and the defendant's state of mind at the time those statements were made and thereafter. [¶] For that limited purpose, you may consider them, but for no other purpose may you consider them."

Given the relevance of the evidence and the instruction, we would find any abuse of discretion under section 352 to be harmless, in that it is not reasonably probable the

Robin's Understanding of Defendant's Incarceration

Defendant contends that the court erred in admitting Robin's testimony that she thought defendant had been convicted and sent to prison only for statutory rape involving consensual sex with a minor.[5] He claims that the reference to his being in prison was prejudicial.

The trial court found the evidence relevant and more probative than prejudicial. Again, we find no error.

The record reveals that Robin was at the party with A. and defendant and others, and there was drinking. When Robin departed, she left A. alone with defendant and took her car keys. This evidence would support an inference that *despite defendant's prior history of assaulting young women*, Robin, and by implication A., still completely trusted him and did not fear or even suspect that he could or would assault A., even though they would be alone drinking together after everyone left the party. Given that inference, jurors could find it less likely that defendant attacked A. Such an inference had a tendency to bolster the defense of consent.

The trial court reasonably could find the challenged evidence to be admissible because it could rebut that inference. It would show that show that Robin's, and by implication A.'s, trust was based on a mistaken impression of defendant's prior criminal activity and explain why Robin continued to maintain a strong bond with defendant after his conviction and imprisonment and felt comfortable leaving A. with him.

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defendant would have obtained a more favorable result had the evidence been excluded. (See *People v. Partida* (2005) 37 Cal.4th 428, 439; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

[5] In essence, Robin testified that she thought defendant had been railroaded into prison. She testified that she believed he had been imprisoned because "he was with a minor and her father came home and basically caught them, and she was told . . . that if she didn't charge him with rape [her traditional Hispanic family] basically would send her back to Mexico."

Even if Robin's mental state was of only marginal relevance, we would find any error in admitting her testimony to be harmless.

The jury learned the real reason for defendant's incarceration, and Robin's mistaken understanding was less inflammatory than his prior offenses. Moreover, the court admonished the jury that the testimony was admitted only to show Robin's state of mind.

Moreover, the evidence of guilt was strong. Defendant's prior offenses constituted compelling evidence of his propensity and intent to commit rape. On the other hand, there was little or no evidence that A. lied about the rape or had a motive to do so. There was no evidence that she was mad at defendant or had a reason to falsely accuse him. We note that during closing argument, defense counsel suggested that A. accused defendant because she felt guilty or ashamed about having had sex with him. However, as the prosecutor argued, this theory was inherently weak. If A. felt ashamed and guilty for having had sex with defendant, it is doubtful that her shame and guilt would have motivated her to publicize news about her sexual conduct, falsely accuse him of rape, subject herself to the trauma of a SART examination, interrogation, preliminary hearing, and trial, and traumatize her ex-boyfriend and family, defendant, and his family.

Next, the uncontradicted evidence showed that A. was physically upset, emotional, and hysterical after the attack, even much later when she spoke to the police. Such a reaction is consistent with her having been sexually attacked. Moreover, her behavior was consistent with the testimony concerning rape trauma syndrome.

The only evidence suggesting consent was that A. told Patricia and Sheldon that that defendant had not done anything to her. However, she made those statements when she was still inside defendant's house, where she was afraid for her life because of defendant's attack and threats. Moreover, while still at his house, she sent messages to

her ex-boyfriend and Sheldon, asking to be rescued. When she was finally safe at her ex-boyfriend's house and later at home, she reported defendant's assault.

Under the circumstances, we do not find it reasonably probable defendant would have obtained a more favorable result had Robin's testimony been excluded. (See *People v. Watson, supra,* 46 Cal.2d 818, 836.)

Parole Restriction concerning Living with Minors

Defendant claims that the court erred in permitting the prosecutor to ask Patricia whether the reason her teenage children did not live with her while defendant was there was that he was not "allowed" to be around children. He argues that the question (and its answer) were irrelevant.

As noted, Patricia denied that the reason her children did not live at home was that defendant was not allowed to be around them, but shewas impeached by her statement to police that her children did not stay with her because defendant had a parole condition prohibiting him from being around children.

The court permitted the prosecutor's question because it tended to show bias and thus was relevant to her credibility. Indeed, defendant concedes that "[a]rguably, there may have been some marginal relevance to the fact that [Patricia] was aware of the legal restriction on [defendant] having contact with minors and [Patricia] nonetheless chose to be [defendant's] girlfriend, even at the cost of having her two children live elsewhere for two months so that she could live with [him] during that time: this demonstrated [Patricia's] loyalty to [him] and her bias as a witness."

We agree with defendant's analysis of relevance but disagree that it was marginal. In our view, the trial court reasonably could have found that the evidence had a strong tendency to show Patricia's bias. Moreover, Patricia's denial that the legal restriction was the reason and denial that she had said so to the police further demonstrated her willingness to lie for him.

Defendant claims that evidence of Patricia's longtime relationship with defendant provided ample evidence of bias and rendered additional evidence cumulative. He argues that the prosecution had no right to present the cumulative evidence because it created a substantial danger of undue prejudice.

Although the evidence was cumulative, evidence that Patricia was willing to forego being with her own children was qualitatively different from and much stronger evidence of bias than merely having a longtime relationship. Moreover, we fail to see how the evidence was unfairly prejudicial. The parole restriction was obviously related to the crimes for which he was imprisoned and later on parole. Thus the restriction had no tendency cause jurors to view defendant any differently. (Cf. with *People v. Cardenas* (1982) 31 Cal.3d 897, 905 [in non-gang case, error to admit inherently prejudicial gang evidence that was marginally relevant and cumulative on issue of bias]; *People v. Avitia* (2005) 127 Cal.App.4th 185, 193-194 [same].)\

Patricia's Understanding of Defendant's Incarceration

Defendant contends the court erred in permitting the prosecutor to question Patricia about whether she knew that defendant had been incarcerated for rape and assault with intent to commit rape and forcible oral copulation.

The Attorney General notes that defense counsel failed to object to the prosecutor's line of questioning and argues that defendant forfeited any claim of error. (Evid. Code, § 353.) Defendant counters that he may raise the issue because an objection would have been futile: the court had already overruled objections to the admission of defendant's prior offenses. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 692 [counsel not required to make repetitive futile objections].) However, the reason for objecting to the cross-examination of Patricia would not have been the same as the reason for objecting to the admission of prior crimes because the prosecutor had a different purpose in offering each type of evidence. The former was aimed at showing bias; the latter at showing

propensity. Thus, we do not find the "futility" exception to requirement of a timely objection applicable and conclude that defendant forfeited this claim.[6]

IV. CRUEL AND/OR UNUSUAL PUNISHMENT[7]

Defendant contends that his sentence of 217 years to life violates the constitutional proscriptions against cruel and/or unusual punishment. (See U.S. Const., 8th Amend.; Cal. Const., art. I, § 17.) In particular, he claims that section 667.61, subdivision (a)—also known as the "One-Strike" law (*People v. Miralrio* (2008) 167 Cal.App.4th 448, 454—under which the court imposed consecutive 25-year-to-life terms for one rape and forcible penetration, which were both tripled to 75 years to life under the "Three Strikes" law, is facially unconstitutional. Defendant further claims that the sentence is unconstitutional because it is disproportionate to his level of culpability.

Constitutionality of Section 667.61

Defendant argues that section 667.61 is unconstitutional because it mandates a term of 25 years to life for committing enumerated offenses under specified circumstances, but it fails to recognize significant gradations of culpability depending on the severity of the current offense or factor in mitigating circumstances. Defendant acknowledges that this court and others have rejected this and similar claims but respectfully asserts that those cases were incorrectly decided. (See *People v. Alvarado* (2001) 87 Cal.App.4th 178, 199-201 [6th Dist.]; *People v. Estrada* (1997) 57 Cal.App.4th

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[6] Defendant makes a general claim of ineffective assistance based on counsel failure to raise objections. Insofar as this claim relates to counsel's failure to object to the questions asked Patricial, we reject it. The record does not reveal counsel's reasons for failing to object, and the record does not clearly establish that counsel's omission could not have been the result of a reasonable tactical decision. Where the record on direct appeal "does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation." (*People v. Anderson* (2001) 25 Cal.4th 543, 569.)

[7] In this section all unspecified statutory references are to the Penal Code.

1270, 1277-1282 [2d Dist., Div. 7]; *People v. Crooks* (1997) 55 Cal.App.4th 797, 803-809 [3d Dist.].)

Defendant offers nothing more to a claim that we have already rejected. Nor does he convince us that our analysis was faulty. Thus, we reject it again.

Disproportionality

In a very argument, defendant notes that he did not physically injure A., and after being convicted, he admitted his guilt and expressed remorse. He further notes that he is a 39-year-old divorced father of three young children and had been employed since June 2006. He also asserts that he suffered sexual abuse as a child and has had a serious and long-standing substance abuse problem with alcohol and methamphetamines. Last, defendant points out that his sentence exceeds the punishments for murder and continuous child molestation. Under the circumstances, defendant claims that his sentence is "draconian" and unconstitutionally disproportionate to his level of culpability.

A punishment is excessive under the Eighth Amendment if it involves "the unnecessary and wanton infliction of pain" or if it is "grossly out of proportion to the severity of the crime." (*Gregg v. Georgia* (1976) 428 U.S. 153, 173.) A punishment may violate article I, section 17 of the California Constitution if "it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted; *People v. Dillon* (1983) 34 Cal.3d 441, 478.) Generally, in determining whether a particular punishment is cruel or unusual, we examine the nature of the particular offense and offender, the penalty imposed in the same jurisdiction for other offenses, and the punishment imposed in other jurisdictions for the same offense. (*Solem v. Helm* (1983) 463 U.S. 277, 290-291; *In re Lynch, supra*, 8 Cal.3d at pp. 425-427; *People v. Romero* (2002) 99 Cal.App.4th 1418, 1431-1432; *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1509-1510.)

Defendant's age and post-conviction show of remorse do not necessarily militate in his favor. Indeed, although defendant was much older when he attacked A., he acted in much the same way he did when he was younger. Moreover, although he exhibited remorse, he did so only after accusing A. of precipitating their sexual encounter and making her go through a preliminary hearing and trial. (Cf. *People v. Alvarado, supra,* 87 Cal.App.4th at p. 200 [life term constitutional despite defendant's age, lack of record, remorse]; *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520 [129-year term for multiple sexual offenses constitutional despite lack of prior record and mental impairment].)

Defendant fails to explain how his employment history and marital and parental status and sexual abuse as a child mitigate his culpability or suggest that his sentence is unconstitutional. We note that he committed his offenses despite the risk to his employment and potential impact on his children if he was caught and convicted. Such circumstances tend to make him more culpable.

Likewise the sketchy information in the probation report about defendant's substance abuse problems does not necessarily militate in his favor because he committed his offenses despite an awareness of his substance abuse problems and an alcohol parole condition. Moreover, his abuse of methamphetamine is irrelevant because there is no evidence that he used that drug the night he attacked A.

Next, the fact that defendant did not brutalize or inflict physical injuries on A. does not mitigate his offense or suggest that his sentence is shockingly disproportionate. Defendant took advantage of a young woman by supplying her with alcohol and exploiting her familial trust in him. He physically attacked her and forcibly raped her twice. He digitally penetrated her and then made a crude compliment about her genitals. He then threatened to kill her to dissuade her from reporting his offense. Furthermore, defendant overlooks the emotional and psychological scars that can result from being raped by a trusted adult and the impact it can have on future relationships.

Last, defendant's claim that his sentence is disproportionate because it is greater than that imposed for murder or continuous sexual abuse fails because his comparison is inapt. Defendant's punishment is not based solely on the fact that he committed the charged crimes. It is based on the fact that he committed them as a recidivist offender with six prior strike convictions for serious and violent felonies. Recidivism justifies the imposition of longer sentences for subsequent offenses. (*People v. Cooper* (1996) 43 Cal.App.4th 815, 824.)

For example, in *Rummel v. Estelle* (1980) 445 U.S. 263, the United States Supreme Court explained that society is warranted in imposing increasingly severe penalties on those who repeatedly commit felonies. In that case, the defendant was given a mandatory life sentence for stealing $120.75 and having prior convictions for fraud involving $80 worth of goods and passing a forged check for $28.36. (*Id*. at p. 265.) The court rejected the defendant's claim that his sentence was disproportionate to the severity of his current offense. The court pointed out that the primary goals of a recidivist statute are to "deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes . . . . [T]he point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction." (*Id.* at pp 284-285.)

In *Lockyer v. Andrade* (2003) 538 U.S. 63, the court rejected a similar claim. There, the defendant was convicted of two counts of petty theft with a prior based on taking $153.84 worth of videotapes from two stores on separate occasions. The

defendant had at least two prior strike convictions. The court sentenced him under the Three Strikes law to two consecutive life terms. The defendant's criminal history comprised a 1982 misdemeanor theft conviction and a few felony burglary convictions; a 1988 conviction for transporting marijuana; a 1990 misdemeanor petty theft conviction and a second conviction for transporting drugs; in a 1991 parole violation. Given these circumstances, the United States Supreme Court did not find the defendant's sentence to be unconstitutional.

In *Ewing v. California* (2003) 538 U.S. 11, the defendant was convicted of grand theft based on his taking three golf clubs worth $399 each. The court imposed a life term under the Three Strikes law. The defendant's criminal history spanned from 1984 to 1999 and included misdemeanor and felony convictions for petty theft, auto theft, battery, burglary, robbery, possession of drugs, trespass, and unlawful possession of a firearm. Again, the United States Supreme Court did not find the sentence unconstitutional.

In *People v. Meeks* (2004) 123 Cal.App.4th 695, the defendant was convicted of multiple violations of section 290 and given a life term. The record revealed that he registered at least nine times between 1982 and 1997 and then failed to do so until his arrest in 2000. (*Id*. at pp. 700-701.) The defendant had prior between 1969 to 1993 for burglary, possession of arson material, attempted rape, rape, robbery, assault, possession of drugs, and driving under the influence. He also had numerous parole violations. A majority of the court concluded that the defendant's sentence was a constitutionally permissible means of punishing him and deterring others from committing future crimes. Moreover, it found that his lengthy criminal record brought him within both the letter and spirit of the Three Strikes law.

Similarly, in *People v. Poslof* (2005) 126 Cal.App.4th 92, the defendant was convicted of failing to register and sentenced under the Three Strikes law to a term of 27 years to life. The defendant's criminal history comprised a 1982 conviction for

inflicting corporal punishment on a child; a 1992 conviction for lewd conduct with a child; and a 1996 conviction for possessing drugs. The defendant also violated parole in 1995, 1998, and 1999. The court concluded that the defendant's sentence was constitutional.

Defendant's circumstances are distinguishable from those in *Rummel*, *Andrade*, *Ewing*, *Meeks*, and *Poslof* because his current and prior crimes are *more* serious and thus make his current offenses more deserving of lengthy punishment.

In short, defendant has failed to demonstrate that his punishment is unconstitutionally disproportionate to culpability or that it otherwise constitutes cruel and/or unusual punishment.

V. DISPOSITION

The judgment is affirmed.

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RUSHING, P.J.

WE CONCUR:

_____
PREMO, J.

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ELIA, J.